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**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**

FREDERICK MEISWINKEL, INC.,  
a California corporation,

Plaintiff,

v.

NATIONAL FIRE INSURANCE  
COMPANY OF HARTFORD,

Defendants.

Case No. 3:07-cv-05064 WHA

**PLAINTIFF'S OPPOSITION TO  
NATIONAL FIRE INSURANCE  
COMPANY OF HARTFORD'S  
MOTION TO STAY  
PROCEEDINGS**

**Date:** March 20, 2008  
**Time:** 8:00 a.m.  
**Courtroom:** 9  
**Judge:** William Alsup

Plaintiff FREDERICK MEISWINKEL, INC. ("FMI") respectfully submits its Opposition to the Motion of NATIONAL FIRE INSURANCE COMPANY OF HARTFORD ("National") to Stay Proceedings.

**I.**

**INTRODUCTION**

While National concedes that FMI was forced to file suit "because National did, in fact, withdraw from the defense of the underlying liability action entitled 88 King Street, LLC v. Frederick Meiswinkel, Inc." pending in the San Francisco Superior Court, it seeks a stay of this action because, after forcing its insured to file suit and incur significant expenses – both in this suit

1 and in connection with the underlying actions – National “agreed to rejoin the defense” on February  
 2 4, 2008. National ignores the fact that it has failed to pay defense counsel to defend the underlying  
 3 actions; has failed to provide a full and complete defense to FMI in the underlying actions thereby  
 4 forcing FMI to hire its own counsel to ensure that a proper defense has been provided; unilaterally  
 5 withdrew its defense shortly before trial of the underlying actions was scheduled; repeatedly ignored  
 6 information which established a potential for coverage in the underlying actions; and repeatedly  
 7 failed to attend court-ordered mediations in the underlying actions, thereby frustrating efforts to  
 8 globally settle the underlying actions.<sup>1</sup> In short, National asks the Court to ignore its bad faith  
 9 conduct towards its insured – which has already occurred – and stay the action now that it has  
 10 belatedly agreed to do what it willfully and wrongfully failed to do, all to plaintiff’s damage.  
 11 While the question of whether or not FMI has any liability to plaintiffs in the underlying action is  
 12 “inextricably tied into all of the facts in the underlying case . . .,” National’s bad faith in the handling  
 13 of FMI’s defense is not.

14 National only agreed to “rejoin the defense” after forcing FMI to incur substantial fees and  
 15 costs and file suit, and FMI should not be precluded from seeking the damages to which it is entitled.  
 16 National’s motion should, therefore, be denied.

## 17 II.

### 18 STATEMENT OF FACTS

19 The underlying action is a construction defect case involving a 233-unit condominium  
 20 complex pending in the San Francisco Superior Court.<sup>2</sup> FMI was insured under three policies of  
 21 insurance issued by Transcontinental Insurance Company, now National, for the periods January  
 22 1998 through January 2001. Defense of the underlying actions was tendered to National pursuant  
 23 to these policies and, in August of 2004, National agreed to defend FMI by retaining the services  
 24 of attorney Geoffrey Wood of the firm Morton Lulofs & Wood.

25 In July of 2006, however, FMI learned that Mr. Wood was withdrawing as counsel for FMI

26 <sup>1</sup> See Declaration of Jon S. Brick and exhibits thereto.

27 <sup>2</sup> There were three original actions arising from the construction of the condominiums which have been  
 28 consolidated in a single action, San Francisco Superior Court Case No. CGC04-42955.

1 because National refused to pay him for the reasonably incurred defense fees. FMI was forced to  
2 hire counsel and threaten litigation against National before it ultimately agreed, along with one of  
3 FMI's other insurers, Zurich North America, to jointly retain the services of the law firm of Burnham  
4 & Brown to continue with FMI's defense. Although National eventually agreed with Zurich to  
5 retain Burnham & Brown, National continued its pattern of refusing to pay for its share of reasonably  
6 incurred defense fees, delayed payment of invoices, and engaged in other conduct establishing its  
7 failure to provide a full and complete defense. Its efforts were more geared towards finding a way  
8 out of coverage than defending FMI.<sup>3</sup>

9 On July 10, 2007, National informed FMI that it was unilaterally withdrawing its defense,  
10 effective on only 15 days notice! Despite requests from FMI's personal counsel, National made  
11 good on its threat and withdrew from the defense.

12 FMI, through its counsel, made repeated demands on National to reconsider its denial and,  
13 after repeated denials by National, FMI was forced to file this action. FMI's attempts to convince  
14 National to resume the defense continued, to no avail. Meanwhile, several mediations went forward  
15 in the underlying cases. National never appeared at these mediations. Had it done so, it is possible  
16 that the underlying actions would have settled (which they still have not.)<sup>4</sup>

17 Indeed, it was not until after FMI was forced to engage in the pre-trial Rule 26 initial  
18 disclosures – which, among other things provided documents which National should have located  
19 if it had thoroughly investigated the underlying claim – that National belatedly advised FMI that  
20 National would be rejoining the defense. In doing so, National reserved all of its rights, including  
21 “(1) the right to seek a judicial declaration as to its rights and obligations, if any, under its policies,  
22 (2) the right to withdraw from the defense, and (3) the right to decline indemnity.” See Exhibit “A”  
23 to Declaration of James Teater filed in support of defendant's Motion to Stay. National not only  
24 reserved for itself a right which it now seeks to deny to its insured – the right to seek a judicial  
25 declaration as to its rights and obligations under the policy – but also reserved the right to once again

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27 <sup>3</sup> See Declaration of Jon S. Brick and exhibits thereto.

28 <sup>4</sup> See Declaration of Jon S. Brick and exhibits thereto.

1 withdraw the defense. Given National's conduct towards FMI in the past, if this action is stayed  
 2 there is nothing which would prevent National from once again unilaterally withdrawing from the  
 3 defense of the underlying action and requiring FMI to start the whole process over again, effectively  
 4 doubling the legal expenses it has already paid compelling National to comply with California law.  
 5 National's letter also sets forth 8 pages of provisions of the policy which National contends may  
 6 provide it the right to deny coverage and reserves National's "right to seek reimbursement" from  
 7 FMI for any and all attorneys' fees and costs which National incurs in defending the claims.

### 8 III.

#### 9 ARGUMENT

10 National's contention that California law requires that "a coverage action must be stayed  
 11 pending resolution of the underlying action" is a misstatement of the law. In Montrose Chemical  
 12 Corp. v. Superior Court, 6 Cal.4th 287 (1993) ("Montrose I"), the California Supreme Court  
 13 affirmed a decision of the appeals court which required the insurance company to provide a  
 14 defense to its insured in the underlying actions. In discussing whether or not an insurance company  
 15 may properly seek a judicial determination of its defense obligations, the Court noted that "[t]o  
 16 eliminate the risk of inconsistent factual determinations that could prejudice the insured, a stay  
 17 of the declaratory relief action pending resolution of the third-party suit is appropriate when the  
 18 coverage question turns on facts to be litigated in the underlying action. ... By contrast, when the  
 19 coverage question is logically unrelated to the issues of consequence in the underlying case, the  
 20 declaratory relief action may properly proceed to judgment. Montrose, supra, 6 Cal.4th at 301-302.  
 21 (Emphasis added.)

22 National's contention the "main coverage issues left for determination is how much  
 23 indemnity coverage might be owed" simply ignores the fact that the Complaint is for breach  
 24 of contract and breach of the implied covenant of good faith and fair dealing. National's duty to  
 25 indemnify FMI, and any potential breach of that duty, has not yet been triggered. (National also  
 26 has a duty to settle the case within policy limits which, to date, it has refused to do.) The issues to  
 27 be decided in the underlying litigation are whether or not FMI is liable to the parties for the alleged  
 28 defects arising from the construction of the condominium project. The issue in this suit between

1 FMI and National is National's breach of its duty to defend and the damages arising from that  
 2 breach. The fact that National failed to provide an adequate and complete defense to FMI;  
 3 unilaterally withdrew that defense without adequate basis; failed to meaningfully participate  
 4 in the settlement process; and forced FMI to retain counsel, file suit and engage in costly litigation  
 5 before agreeing to resume its defense – thereby establishing its duty to defend – remain to be litigated  
 6 here. Those issues simply have no bearing on any potential liability of FMI in the underlying actions.

7 The cases cited by National for the proposition that where an insurer is providing a  
 8 defense in the underlying suit, there is no cognizable cause of action for bad faith under California  
 9 law, are inapposite. Those cases did not involve a situation where, as here, the insurer was providing  
 10 a defense – albeit insufficiently – unilaterally withdrew that defense, and only agreed to resume the  
 11 defense after the insured was forced to retain counsel and file suit. The tort of bad faith, as any other  
 12 tort, is actionable once the insured has sustained actual damage. Gourley v. State Farm Mutual Auto  
 13 Insurance Co., 53 Cal.3d 121, 129 (1991). See also Hamilton v. Maryland Casualty Co., 27 Cal.4th  
 14 718, 727 (2002). Given the present circumstances, FMI has clearly suffered damages in the form  
 15 of attorneys' fees and costs which, but for the actions of National, it would not have been forced  
 16 to incur.

#### 17 IV.

#### 18 CONCLUSION

19 National failed to provide an adequate defense to FMI in the underlying actions and  
 20 unilaterally withdrew its defense without any basis. National could have, and should have, complied  
 21 with its duty to defend and settle the underlying actions, but did not. Indeed, it was not until FMI  
 22 was forced to incur significant costs and fees to file suit that National finally agreed to do that which  
 23 it should have done in the first place: provide a defense to its insured. Having done so, National  
 24 now seeks to prevent its insured from seeking payment of the damages which National has caused.  
 25 However, even if tomorrow National paid its policy limits and settled the underlying actions, it still  
 26 remains liable to the plaintiff for the damages caused by the wrongful failure to defend, and plaintiff  
 27 has the right to recover those damages now, rather than allowing National to unnecessarily delay the  
 28 ///

1 inevitable. National's motion should be denied.

2  
3 Respectfully submitted,

4 Dated: March 6, 2008

5 GRECO TRAFICANTE SCHULZ & BRICK

6  
7 By: 

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Jon S. Brick, Esq.

Attorneys for Plaintiff

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9 FREDERICK MEISWINKEL, INC.